Supreme Court of the United States

October Term, 1939
No. 394

STATE OF MINNESOTA, EX REL. CHARLES EDWIN PEARSON,
Appellant,

vs.

PROBATE COURT OF RAMSEY COUNTY, MINNESOTA, AND HON. MICHAEL F. KINKEAD, JUDGE OF SAID PROBATE COURT OF RAMSEY COUNTY,
Respondents.

APPELLANT'S REPLY BRIEF.

JOSEPH F. COWERN,
St. Paul, Minnesota,
Attorney for Appellant.

OTIS H. GODFREY,
ANDREW A. GLENN,
St. Paul, Minnesota,
Of Counsel.

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APPELLANT'S REPLY BRIEF.

Certain Corrections as to Statutes Printed or Referred to by Appellee.

In an appendix to his brief, appellee, on page 54, prints Section 8992-174, Mason's 1938 Supplement, as being a part of the Minnesota statutes dealing with the insane. The life of that section ended on April 15, 1939, when it was superseded by Section 10 of Chapter 270, Laws of 1939.

On pages 4 and 5 of appellee's brief, it is stated that Chapter 369 adopts "Sections 8992-164 (14) to 8992-171, inclusive, covering appeals;". The statement is inaccurate. The question of appeals is covered by the last sentence in Section 2 of the act and the sections of Mason's 1938 Supplement there specifically adopted are: "Sections 8992-166, 8992-167, 8992-169, 8992-170."

It will be noticed that Sections 8992-164, 8992-165, 8992-168 and 8992-171, all of which are included in appellee's statement of existing law, are expressly excluded by the act itself. This is of some importance as the excluded Section 8992-168 provides that:

> 'Such appeal shall suspend the operation of the order, judgment or decree appealed from until the appeal is determined or the District Court shall otherwise order."

This Section 8992-168 does not necessarily require a release of the accused in case of an appeal, but by arbitrarily inserting it in Chapter 369, appellee seeks to find support for an assumption that such appeal would entitle the accused to his release pending the result of the appeal. As that section is not included in the act there can be no doubt about the correctness of our statement that the accused must lie in jail pending his appeal notwithstanding the fact that he has given the bond required by Section 8992-166 as amended.

In the appendix to his brief on page 60, appellee prints as a part of the statutes dealing with the insane, Section 8992-143, Mason's 1938 Supplement. This section is no longer in existence, it having been superseded by Section 8 of Chapter 270, Laws of 1939.

As to the Committee Report Made to the Governor.

Reference to this report is made in appellee's brief on pages 20 to 23. We have a copy of that report. It shows that it was prepared hurriedly and without proper study. Most of the recommendations made by the committee were ignored.

The second paragraph of the report shows that at this time many aspects of the problem presented by psychopathics are "necessarily vague and uncertain." The committee recommended several changes in the Probate Code, none of which were followed. Because of the lack of time, the committee reported that it had "been unable to do the necessary legal research to determine whether other sections need similar change."

The committee recognized that the problem under consideration was one surrounded by an atmosphere of vagueness and uncertainty and that any rational program would call for additional facilities and new types of institutional treatment. It added: "That, however, is a matter which the Committee does not feel competent to discuss at the present time", and it recommended the appointment of an Interim Committee of the Legislature to: "Arrange for, supervise, or direct a more comprehensive study of the legal, medical and administrative aspects of the whole problem." It further suggested that this Interim Committee cooperate with committees from the various bar associations, medical associations and the National Committee on Mental Hygiene, and report to the next legislature. It recognized the lack of present facilities for treatment and suggested a need for more specialized forms of treatment, adding:

"This may involve the preparation of cost data on a new type of institution for the care of the dangerously defective and psychopathic."

It also suggested:

"The desirability of modification of present laws relating to sterilization to permit greater experimentation with this operation as a form of treatment."

The report then referred to a statement attached thereto prepared by Dr. J. C. McKinley of the University of Minnesota.

Dr. McKinley's letter, dated March 20, 1939, discloses in the opening paragraph that it was a hurried document prepared without proper study and preparation. This appears from the following sentence in the opening paragraph of his letter:

"The time for preparation has been so short that my words make no pretense of being scholarly or complete, and the Committee has had no opportunity to edit the statement."

Later in the same paragraph he said:

"These are largely my own random thoughts which are necessarily tentative and subject to revision and expansion on more leisurely consideration and more searching study."

It is significant that the committee recognized that the employment in psychopathic cases of "licensed doctors" (unless they be active and qualified psychiatrists) is a travesty on justice. It recommended that the Interim Committee devote time to:

"Consideration of the whole question of how best to provide adequate psychiatric service to the courts."

Under Chapter 369 a Man Can be Sent to the Insane Asylum For Life Without His Case Having Been Considered by Anyone Learned in the Law or by Any Doctor Learned in Sexual or Mental and Nervous Cases.

Except as provided otherwise in the Constitution itself, Section 7 of Article 7 of the Constitution of Minnesota, makes every person entitled to vote eligible to any elective office, provided he has lived in the election district for thirty days prior to the election. The only provision otherwise is Section 6 of Article 6 which provides that judges of the Supreme and District courts "shall be men learned in the law."

The county attorney to whom the facts are first submitted and who prepares the petition is not necessarily an attorney and does not even have to be learned in the law. He may be a popular barber. It was so held in State v. Clough, 23 Minn. 17—the ruling being forced by Section 7 of Article 7 of the Minnesota Constitution.

The office of Probate Judge, being an elective office, is usually held in Minnesota by men who are not learned in the law and who have never been licensed to practice law. The Honorable Albin S. Pearson, who was Probate Judge of Ramsey County at the time this proceeding was instituted and the original respondent in this action, informs the writer that in November 1934 of the 87 probate judges in Minnesota 60 were not licensed attorneys. Judge Pearson further stated that the percentage of laymen holding office as judge has since increased. This will continue to be true so long as Section 7 of Article 7 remains unchanged in our constitution.

Court commissioners, who are authorized to act in place of the probate judge under certain circumstances, need not be learned in the law or licensed to practice law. A few years ago the legislature attempted to remedy this but the provision in the act requiring court commissioners to be learned in the law was held unconstitutional and void in State v. Reis, 168 Minn. 11. We know of no court commissioners who are lawyers.

The two doctors who are appointed to take part in the examination of the accused are not required to have had any experience in mental, sexual or nervous cases and are not even required to be in active practice. It therefore follows that the accused, under Chapter 369, may be committed to an insane asylum upon the certificate or testimony of doctors not qualified to recognize a psychopathic personality even if they lived with one so afflicted.

As the county attorney may be a barber, the probate judge a real estate man, the court commissioner a butcher, one of the licensed doctors a bone specialist and the other an oculist, it is apparent that one accused under Chapter 369 could take his journey to an insane asylum without having met on his way anyone learned in the law, or anyone having any knowledge of psychopathic personalities.

That commitment is for life is admitted on page 27 of appellee's brief where it is stated: "the commitment is without term."

As bearing on the above situation, and in addition to the authorities cited in our original brief, we quote from two other authorities:

> "The question is not what is actually being done under a statute that determines its constitutionality,

but what may be done under and by virtue of its provisions."

Minneapolis Brewing Co. v. McGillevray, 104 Fed. 258.

"The constitutionality of a law is determined, not alone by what has been done, but by what may be done, under its provisions."

Watertown v. Christnacht, 39 S. D. 290, 164 N. W. 62.

The unique and disgraceful situation above demonstrated could readily have been avoided by requiring the petition to be filed with the District Court and by requiring the court to appoint qualified psychiatrists in active practice to take part in the examination.

There is no Provision for the Release of Persons Adjudicated Irresponsible Under Chapter 369 and There is no Statute Expressly Authorizing a Re-examination of the Original Issue.

On page 61 of his brief, appellee prints Sections 4523 and 4524 of Mason's 1927 Statutes. These sections are found in Chapter 25 dealing with the Board of Control and are printed for the purpose of suggesting that one adjudged a psychopathic personality under Chapter 369 could be released at any time by the superintendent of the insane asylum to which he had been committed. This view is emphasized in appellee's brief on page 27 where reference is made also to Mason's 1938 Supplement, Sections 8992-179 and 8992-180. In Sections 4523 and 4524 there is no provision for approval of the release by any court.

Bearing in mind that an adjudication under Chapter 369 establishes the accused as "dangerous to other persons," Sections 4523 and 4524 pass out of the picture entirely. This necessarily follows as Mason's 1938 Supplement, Section 8992-180 (appellee's brief pages 58, 59) forbids the release by the Board of Control "or any institution" of anyone "found by the committing court to be dangerous to the public" unless such release be authorized by an "order of a court of competent jurisdiction."

Section 8992-179, Mason's 1938 Supplement, deals with the release by the Board of Control of the insane, feebleminded, inebriate or epileptic under certain conditions. That power, however, is expressly limited by Section 8992-180, which forbids its exercise in the case of anyone "found' by the committing court to be dangerous to the public."

It is perfectly obvious that there is no provision for release because of the fact that adjudication under Chapter 369 necessarily embodies a finding that the individual in question is "dangerous to other persons."

Is there any provision authorizing a re-examination of the original issue and the entry of an order analagous to that restoring an insane person to capacity? In our original brief (page 57) we assumed that release might be secured later if a new board of examiners found the person no longer dangerous. Such a new board was provided for in Section 8959, Mason's 1927 Statutes. Appellee, however, calls attention to the fact that this Section 8959 was expressly repealed at the time of the doption of the Probate Code—Chapter 72, Laws 1935. He is correct, and if there is any provision of law for a re-examination of the original issue, it must be found in Section 8 of Chapter 270,

Laws of 1939, which supersedes Section 8992-143, Mason's 1938 Supplement, printed in appellee's brief on page 60. It is extremely doubtful whether that section is applicable for reasons now to be mentioned.

On its face the section is explicitly limited to persons who have "been adjudicated insane or inebriate" and to persons under guardianship. To be applicable the provision just quoted would have to be amended to include some such words as those in italics below:

> "Any person who has been adjudicated insane or inebriate and *any person who has been adjudged irresponsible sexually and thereby dangerous to other persons under Chapter 369 Laws of 1939.*"

This section then provides that the court shall adjudge the person restored to capacity:

> "Upon proof that such person is of sound mind and capable of managing his person and estate, and that he is not likely to expose himself or his family to want or suffering, * * *."

It is perfectly obvious that the portion of the section just quoted would have to be amended by adding a proviso in words substantially as follows:

> "Provided, that where such person is one who has been adjudged, under Chapter 369, Laws of 1939, to be irresponsible sexually and thereby dangerous to other persons, such proof shall establish that such person is no longer irresponsible sexually and dangerous to other persons."

Another provision of this section (not found in the section printed by appellee on page 60 of his brief but appear-

ing in Section 8 of Chapter 270, Laws of 1939, which supersedes the section printed by appellee) which would have to be amended is the one reading:

> "In proceedings for the restoration of an insane or inebriate person the court may appoint two duly licensed doctors of medicine to assist in the determination of the mental capacity of the patient."

As it now stands, that provision applies only to the insane or inebriate.

Does the provision of Chapter 369 making all laws relating to the insane a part of the act, adopt such laws as they stand insofar as applicable, or does it in addition authorize extensive amendments thereof by probate judges? If the latter, is there any certainty that the 87 probate judges (over 70% of whom are not lawyers or learned in the law) will legislate alike so that the same law will apply to all?

As there is no express power given to probate judges to rewrite the various acts dealing with the insane and, as the only provision of law under which a re-examination is possible is limited by its express provisions to the insane, inebriate or epileptic, and requires extensive amendments to make it applicable to persons adjudged to be psychopathic personalities under Chapter 369, it is, to say the least, extremely doubtful whether there is any method provided for securing a re-examination of the original adjudication. If it be held that the probate judges have no power to rewrite the statutes, then one committed under Chapter 369 must stay in the insane asylum until his death, as it has been adjudged that he is "dangerous," and the release of those who have been adjudged dangerous is expressly forbidden.

As to Vagueness, Indefiniteness and Uncertainty.

The questions arising under this heading are covered on pages 28 to 44 of our original brief. Two additional comments are suggested by appellee's brief.

It is true that the report to the governor referred to in appellee's brief on pages 20-23 dealt with psychopathics generally, and it is suggested that the original of Chapter 369 also dealt with psychopathics generally and that the proviso to Section 1, which we quote later, was dropped after the act was amended to confine it to sexual psychopathics. Speaking of this proviso, appellee on page 23 of his brief says that it:

> "became wholly superfluous *when* the act was confined to sexual matters." (Italics ours.)

That fact is that the original bill submitted to the governor and the legislature was prepared by the present attorney general's staff *and dealt only with sexual psychopathics.* Section 1 then read (omitting the proviso) exactly as it now reads. The attorney general then realized that Section 1 was dangerously vague, indefinite and uncertain, for he thought it necessary to add, and did add, a proviso reading as follows:

> "provided, that political or religious belief or activity, racial origin, or behavior occurring in connection with a labor dispute or a strike, shall not in any case be considered as a basis for a finding of psychopathic personality."

This proviso constituted a considered, deliberate and direct admission by the attorney general of the state that the words and phrases of Section 1 of Chapter 369 were dan-

gerously vague, indefinite and uncertain. As the words and phrases are the same now as they were when the admission was made, the admission stands.

The other comment that we wish to make relates to appellee's total failure to take into consideration that Chapter 369 is an adventure into a new field of legislation, where definitions and standards are always necessary since the words and phrases used have not acquired a body of recognized rules and standards, as is the case with words and phrases reaching back into the early years of the common law. The failure to take such fact into consideration is illustrated by appellee's comment upon the word "insanity" found in the last paragraph of his brief on page 16 thereof. The distinction that we suggest is most commonly illustrated by words and phrases in laws relating to crime but the significance and application thereof is universal. The rule was referred to by this court in Lanzetta v. State —— U. S. ——, 59 S. Ct. 618, where the court held that a New Jersey statute which used the words "gang" and "gangster" was void because too vague, indefinite and uncertain to constitute valid legislation, the court saying of the words: "Nor is the meaning derivable from the common law, * * * *" The rule is also referred to in Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 136, where the court refers to "a well-settled common-law meaning." "Sane" and "insane" are words that go back into the early history of the common law and come to us with their aura of well-settled common-law meaning. This is not true of the words and phrases of Section 1 of Chapter 369 and could not be true as that act is a pioneering effort in the opening up of a new field of legislation.

As to the Commitment Being for Life and to an Asylum for the Dangerously Insane.

That the commitment is for life is conceded on page 27 of appellee's brief, where he says: "The commitment is without term." The commitment being without term, death alone could end it unless there was some provision for a re-examination of the original issue. The question as to whether there is such a provision is discussed elsewhere.

It is true that in our original brief (page 56) we referred to Section 8959, Mason's 1927 Statutes, as authority for the statement that the court had no discretion but to commit one adjudged dangerous under Chapter 369 to an asylum for the dangerously insane. The statement we made was correct, but the reference to Section 8959 was incorrect as that section had been superseded by Section 8992-176, Mason's 1938 Supplement. No change in the matter covered by our statement was made by this later section. It is true that it changed the word "asylum" to "hospital" and instead of requiring in express words a commitment to an asylum for the "dangerous" it requires commitment to the "proper" hospital. The proper place for the dangerous is the place provided for the dangerous. The mandatory "*shall*" was retained. This "proper" institution to which the court "shall" issue a warrant of commitment is provided for in Section 4528, Mason's 1927 Statutes, where it is stated that it shall "be known as the state asylum for the dangerous insane."

There is no Provision for Bail.

Counsel for appellee, on page 26 of their brief, claim that we were wrong in saying that there is no provision for release on bail of a person accused under Chapter 369 and they point to Section 8992-178, Mason's 1938 Supplement (printed on page 58 of Appellee's brief) as supporting their statement. By its express provisions, and by its consideration in connection with the other sections of the code, this section 8992-178 is clearly limited to cases where a trial has been had and a finding made of insanity. Notwithstanding such a finding, it provides that the Probate Court, before delivery of the warrant of commitment, has power to:

> "release an insane and inebriate patient to any person who files a bond to the state in such amount as the court may direct, conditioned upon the care and safekeeping of the patient."

If this construction were not correct, the section just quoted would have referred to persons who were "charged" with being insane or "charged" with being inebriate. It refers, however, to the "insane" or "inebriate", clearly showing that trial had been had and adjudication made. The section ends:

> "but no person against whom a criminal proceeding is pending or who is dangerous to the public shall be so released."

As to the Subpoenaing of Witnesses and the Paying of Their Fees and Mileage.

Under the constitutional and statutory provisions referred to in our original brief, the accused in criminal cases

is entitled to "compulsory" process. In such cases the sheriff serves the subpoenas without expense to the accused and the witnesses are required to appear without the payment in advance of witness fees and mileage. The ruling of the Supreme Court that proceedings under Chapter 369 are not of a criminal nature takes away from the accused the benefit of this compulsory process, unless it be available under some other statute.

Appellee in his brief (pages 30, 31) says in substance that compulsory process is available to an accused under Chapter 369 by virtue of Section 8992-177, Mason's 1938 Supplement. He says that this section goes so far as to provide for the payment of "even his personal expenses." (Appellee's brief, page 5.) This last statement is not correct. There is no provision anywhere for the payment of the personal expenses of the accused. The sheriff, or other officer, who has such a person in custody is very naturally put to expense in transporting and lodging his prisoner, and those expenses of the sheriff (not the personal expenses of the accused) are to be paid. The only direct provision mentioning the accused is that which provides that if the court appoints counsel for him, such counsel may be paid $10.00 a day for his services.

Chapter 369 specifically provides what aid is to be extended to one accused thereunder. That aid is limited to two things: first, such person "shall be entitled to have subpoenas issued", and, second, "the court may appoint counsel for him." As Chapter 369 specifically covers the matter under discussion and clearly indicates what aid the legislature intended the accused to receive, there is no occasion for turning to other statutes dealing with other

cases. If Chapter 369 had been silent on such matters, we would have an entirely different situation.

The situation, as outlined in our original brief, is not changed by this Section 8992-177. It is doubtful whether it applies to any but witnesses for the state. There is no provision therein for the sheriff serving subpoenas without cost, and without such service the right of the accused to subpoenas is of no value and there are no witnesses to pay. In addition, there is no requirement in this section compelling witnesses to appear without the payment in advance of their fees and mileage.

As to the Opinion of the Supreme Court.

This opinion is found on pages 17 to 28 of the Record. It deals almost entirely with state questions that are not presented or argued in this court. The only portion of the opinion that could have any bearing upon whether the act violates any of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States is found in the brief discussion by the court of whether the act was so indefinite and uncertain as to be void. That portion of the opinion here referred to reads as follows:

> "Applying these principles to the case before us, it can reasonably be said that the language of Section 1 of the act is intended to include those persons who, by a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire. It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual

> propensities. Such a definition would not only make the act impracticable of enforcement and, perhaps, unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined. See Draper, 'Mental Abnormality in Relation to Crime' Am. Jour. of Med. Jur., Vol. 2, No. 3, p. 163."

In the above quotation the court, by construction, adds the word "habitually" to the word "irresponsible" in the last few words of Section 1 of the act, thus avoiding the possibility of a conviction thereunder because of a single instance of misconduct in sexual matters. It does not change in any way any of the other provisions of the act, and the "conditions" that must be proved as rendering the person habitually irresponsible remain exactly as they appear in the act as passed.

All other constitutional questions raised by appellant and argued here are disposed of by the summary statement appearing in the opinion on page 28 of the Record, reading:

> "We conclude that the act is constitutional both in form and in application."

The opinion concedes that the constitutional questions that we are urging in this court were raised by the appellant. (Record, p. 19)

The Opinion of the Minnesota Supreme Court Does Not in Any Way Eliminate or Affect Any of the Conditions to an Adjudication Set Out in Section I of Chapter 369.

Section 1 of Chapter 369 defines a psychopathic personality as a person who is rendered irresponsible sexually because of emotional instability, impulsiveness of behavior, lack of customary standards of good judgment, failure to

appreciate the consequences of his acts, or a combination of such conditions. These four qualities are expressly denominated by Section 1 as "conditions." An adjudication under the act cannot be had unless the proof establishes one or more of such conditions and then further establishes that they are the conditions which render the person irresponsible.

The wording of Section 1 forces such a construction and such construction is the basis of the petition for commitment which appears on pages 4 and 5 of the printed record. In that petition it is alleged that the petitioner believed that appellant was a psychopathic personality:

> "*because of* his emotional instability, impulsiveness of behavior, lack of customary standards of good judgment, failure to appreciate the consequences of his acts *as to render* said Charles Edwin Pearson irresponsible * * *." (Italics ours.)

As we read appellee's brief, this seems to be conceded. On page 16 he mentions "the described conditions" and on the same page he says:

> "There is nothing obscure or confusing about the terms in which *the four criteria* are described." (Italics ours.)

And again on the same page appears the following statement:

> "These terms were evidently chosen and framed with care for the guidance of courts, examiners and others concerned with the act."

And at the top of page 17 he says:

> "The fact is that *the criteria* adopted by the act provide the very element of definiteness which appellant

says is lacking. *They define the boundaries of the field of operation of the act.*" (Italics ours.)

There is nothing in the opinion of the Supreme Court indicating any contrary view, and none could be expected as the intention that the accused is to be rendered irresponsible because of "such conditions" is clear and imperative. The court, if it were to attempt to eliminate or change such conditions, would be amending rather than construing the section. The only word added by the Supreme Court in construing the act is found in that paragraph of the opinion appearing in the middle of page 26 of the printed record, where the court construes "irresponsible" sexually as referring to persons who are "habitually" irresponsible sexually. This Section 1 as passed now ends with these words:

> "as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons."

The only effect of the Supreme Court's opinion is to add the word "habitually" so that as construed by the Supreme Court that portion of Section 1 above quoted will now read, when it comes to enforcement of the act, as follows:

> "as to render such person habitually irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons."

In all other respects the opinion leaves the act as it was passed by the legislature, making it still necessary to prove that the accused is irresponsible and that such irresponsibility was caused by the existence of one or more of the conditions mentioned in Section 1.

There Was no Waiver by Appellant of the Constitutional Questions Presented in This Court and the Case is Not a Moot One.

On page 44 of appellee's brief it is suggested that certain of the constitutional questions relied upon were not urged upon the attention of the state Supreme Court, and that consequently, the case being a moot one, the court might properly refuse to consider certain of the issues raised. One of the cases cited by appellee in support of his position is Northwestern Bell Telephone Company v. Nebraska State Railway Commission, 297 U. S. 471, 56 S. Ct. 536. That case holds that on an appeal from a judgment of the state court only federal questions discussed by the state court would be reviewed by this court *where the record did not disclose what federal questions were presented to the state supreme court.* The ruling of the court is so stated in the syllabus and also appears clearly from the opinion where the court said:

> "The record does not disclose what, if any, federal questions were presented to the state Supreme Court. Its opinion discusses only the first two contentions made here, and we accordingly confine our review to them."

The question there decided is not the question we have here. As mentioned in our original brief, appellant in his petition directly challenged the constitutionality of the act because violative of several provisions of the Minnesota Constitution and also because it violated the due process of law clause, the equal protection of the laws clause and the privileges and immunities clause of Section 1 of the Fourteenth Amendment to the Constitution of the United

States. (Record, p. 1, f. 2 and Record p. 2, f. 3). This was conceded by the Supreme Court in its opinion. (Record, p. 19.)

Because of the fact that the opinion of the state Supreme Court dealt almost wholly with state questions, and because of that attempt might be made to draw an inference that the appellant had in some way or other waived some of the constitutional questions presented, the Chief Justice of the Supreme Court executed and filed a certificate appearing on page 15 of the Record reading as follows:

> "It is hereby certified that both in his brief and in the oral argument in the above cause, as well as in his original petition, the appellant, Charles Edwin Pearson, urged that Chapter 369, Laws of 1939, was void because it was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it denied appellant due process of law and the equal protection of the laws and abridged the privileges and immunities of citizens of the United States, and those questions were necessarily decided against appellant when the act was held valid.
>
> "This certificate is made not for the purpose of attempting to confer jurisdiction on the Supreme Court of the United States, but for the purpose of making it clear that the above claims made by appellant in his original petition were not later waived or withdrawn by him, and because the opinion in the case deals almost entirely with state questions."

This certificate, by order of the court, was made a part of the record in this cause and such order appears in the printed record on page 16.

The court will notice from the certificate that it was not made for the purpose of attempting to confer jurisdiction

upon this court but solely for the purpose of making it clear that appellant had never at any time waived or withdrawn the constitutional objections presented by him, but both in his brief and in his oral argument had urged them upon the court. It also appears that the certificate was filed "because the opinion in the case deals almost entirely with state questions."

For the limited purpose above mentioned, such certificates are a perfectly proper aid to this court in determining whether the constitutional questions were urged in the court below.

Honeyman v. Hanan, 300 U. S. 14, 57 S. C. 350.

The above certainly ought to clear up any doubt about whether the appellant had ever at any time waived or withdrawn the constitutional objections originally presented by him. The fact is, as is shown above, that they were at all times relied upon and urged by him.

CONCLUSION.

The hurried passage of this piece of ill-considered and ill-advised legislation is fully explained by counsel for appellee on page 24 of his brief, where he says:

> "It is common knowledge that the bill received much newspaper publicity while under consideration in the legislature."

Respectfully submitted,

JOSEPH F. COWERN,
St. Paul, Minnesota,
Attorney for Appellant.

OTIS H. GODFREY,
ANDREW A. GLENN,
St. Paul, Minnesota,
Of Counsel.